

permit was subsequently modified by the district engineer, pursuant to 33 CFR 325.7, in such a manner that the resulting permit contains terms and conditions that lead the applicant to decline the modified permit, provided that the applicant has not started work in waters of the United States authorized by such permit. Where an applicant declines a permit (either initial or modified), the applicant does not have a valid permit to conduct regulated activities in waters of the United States, and must not begin construction of the work requiring a Corps permit unless and until the applicant receives and accepts a valid Corps permit.

Denial determination means a letter from the district engineer detailing the reasons a permit was denied with prejudice. The decision document for the project will be attached to the denial determination in all cases.

Notification of Applicant Options (NAO) means a fact sheet explaining an applicant's options with a proffered individual permit under the administrative appeal process.

Notification of Appeal Process (NAP) means a fact sheet that explains the criteria and procedures of the administrative appeal process. Every permit denial, and every proffered individual permit returned to the applicant for reconsideration after review by the district engineer in accordance with § 331.6(b), will have an NAP form attached.

Permit denial means a written denial with prejudice (see 33 CFR 320.4(j)) of an individual permit application as defined in 33 CFR 325.5(b).

Request for appeal (RFA) means the affected party's official request to initiate the appeal process. The RFA must include the name of the affected party, the Corps file number of the denied or declined individual permit application, the reason(s) for the appeal, and any supporting data and information. A grant of right of entry for the Corps to the project site is a condition of the RFA. A standard RFA form will be provided to the affected party with the NAP form. The affected party initiates the administrative appeal process by completing the RFA and returning it to the appropriate Corps of Engineers division office.

Review officer (RO) means the Corps official responsible for assisting the division engineer or higher authority responsible for rendering the final decision on the merits of an appeal.

§ 331.3 Review officer.

(a) *Authority.* (1) The division engineer has the authority and responsibility for administering a fair, reasonable, prompt, and effective administrative appeal process. The division engineer may act as the review officer (RO), or may delegate, either generically or on a case-by-case basis, any authority or responsibility described in this Part as that of the RO. However, the division engineer may not delegate any authority or responsibility described in this Part as that of the division engineer. Regardless of any delegation of RO authority or responsibility, the division engineer retains overall responsibility for the administrative appeal process.

(2) The RO will assist the division engineer in reaching and documenting the division engineer's decision on the merits of an appeal, if the division engineer has delegated this responsibility as explained above. The division engineer has the authority to make the final decision on the merits of the appeal. Neither the RO nor the division engineer has the authority to make a final decision to issue or deny any particular permit, pursuant to the administrative appeal process established by this Part. The authority to issue or deny permits remains with the district engineer. However, the division engineer may exercise the authority at 33 CFR 325.8(c) to elevate any permit application, and subsequently to make the final permit decision. In such a case, any appeal process of the district engineer's initial decision is terminated. If a particular permit application is elevated to the division engineer pursuant to 33 CFR 325.8(c), and the division engineer's decision on the permit application is a permit denial, or results in a declined permit, that permit denial or declined permit would be subject to an administrative appeal to the Chief of Engineers.

(3) *Qualifications.* The RO will be a Corps employee with extensive knowledge of the Corps regulatory program.

§ 331.4

Where the permit decision being appealed was made by the division engineer or higher authority, a Corps official at least one level higher than the decision-maker shall make the decision on the merits of the RFA, and this Corps official shall appoint a qualified individual as the RO to conduct the appeal process.

(b) *General.* (1) *Independence.* The RO will not perform, or have been involved with, the preparation, review, or decision-making of the action being appealed. The RO will be independent and impartial in reviewing any appeal, and when assisting the division engineer to make a decision on the merits of the appeal.

(2) *Review.* The RO will conduct an independent review of the administrative record to address the reasons for the appeal cited by the applicant in the RFA. In addition, to the extent that it is practicable and feasible, the RO will also conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially-promulgated Corps policy guidance have been satisfied. Should the RO require expert advice regarding any subject, he may seek such advice from any employee of the Corps or of another Federal or state agency, or from any recognized expert, so long as that person had not been previously involved in the action under review.

§331.4 Notification of appealable actions.

Affected parties will be notified in writing of a Corps decision on an appealable action. For permit denials, the notification must include a copy of the decision document for the permit application, an NAP fact sheet and an RFA form. For proffered individual permits, when the initial proffered permit is sent to the applicant, the notification must include an NAO fact sheet. For declined permits (*i.e.*, proffered individual permits that the applicant refuses to accept and sends back to the

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Corps), the notification must include an NAP fact sheet and an RFA form. Additionally, an affected party has the right to obtain a copy of the administrative record.

§331.5 Criteria.

(a) *Criteria for Appeal.* (1) *Submission of RFA.* The appellant must submit a completed RFA (as defined at §331.2) to the appropriate division office in order to appeal a permit denial, or a declined individual permit. An individual permit that has been signed by the applicant, and subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided that the applicant has not started work in waters of the United States authorized by the permit. The RFA must be received by the division engineer within 60 days of the date of the NAP.

(2) *Reasons for appeal.* The reason(s) for requesting an appeal of a permit denial, or a declined individual permit, must be specifically stated in the RFA, and must be more than a simple request for appeal because the affected party did not like the permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: a procedural error, an incorrect application of law, regulation or officially-promulgated policy, omission of material fact, incorrect application of the Section 404(b)(1) Guidelines, or use of incorrect data.

(b) *Actions not appealable.* An action or decision is not subject to an administrative appeal under these regulations if it falls into one or more of the following categories:

(1) An individual permit decision (including a letter of permission or an individual permit with special conditions), where the permit has been accepted and signed by the permittee. By signing the permit, the applicant waives all right to appeal the terms and conditions of the permit, unless the authorized work has not started in waters of the United States, and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7;